In the Supreme Court of the United States

October Term, 1977

No. 77-1630

MACK TRUCKS, INC.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

DAVID E. HILL,
Intervenor

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

MACK TRUCKS, INC.,
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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

DAVID E. HILL,
Intervenor

PETITION

Petitioner, Mack Trucks, Inc., respectfully petitions that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 27, 1978.

OPINIONS BELOW

The judgment order of the Court of Appeals is unreported but appears in the appendix at p. 22. The decision and order of the National Labor Relations Board

is reported at 230 NLRB No. 163, and appears in the appendix at p. 23. The decision of the Administrative Law Judge appears in the appendix at p. 25.

JURISDICTION

The order of the Court of Appeals was entered on March 27, 1978. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254 (i).

QUESTIONS PRESENTED

1. Whether an unfair labor practice charge filed on May 5, 1975, alleging a discriminatory discharge is barred by the six-month limitations provision of the National Labor Relations Act where the employee received written notice of his discharge on October 30, 1975?

2. Whether the term "concerted activities for mutual aid or protection" as contained in the National Labor Relations Act includes complaints of an employee over the terms of his individual contract of employment and telephone calls to the Chairman of the Board of a national corporation by a salesman, contrary to written policy and following express warnings against such calls?

3. Whether in this case the Third Circuit Court of Appeals satisfied its responsibility for reviewing the decision of the National Labor Relations Board to determine if said decision is reasonable and fair and supported by substantial evidence on the record considered as a whole?

STATUTORY PROVISIONS INVOLVED

The relevant sections of the National Labor Relations Act are as follows:

Section 8 (a) (1) (29 U.S.C. §158 (a) (1)):

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

* * * * *

Section 7 (29 U.S.C. §157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title.

* * * * *

Section 10 (b) (29 U.S.C. §160 (b)):

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated

by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court

of the United States pursuant to the Act of June 19, 1934, (U.S.C. title 28, secs. 723-B, 723-C).

* * * * *

Section 10(f) (29 U.S.C. §160(f)):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the Clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

STATEMENT OF THE CASE

This is an unfair labor practice case brought by the National Labor Relations Board against the Petitioner charging it with a violation of Section 8(a)(1) of the National Labor Relations Act for discharging an employee because of his protected concerted activity.

The Petitioner, Mack Trucks, Inc., is a corporation engaged in the manufacturing and distribution of trucks, with facilities located throughout the world. Its corporate headquarters is located in Allentown, Pennsylvania. The charging party, David E. Hill, Intervenor in this case, was a truck salesman employed at the Petitioner's O'Hare Branch, a sales and service facility located at Elk Grove Village, Illinois. The salesmen are not members of any union nor is there any collective bargaining agreement between the Petitioner and its salesmen. The terms of employment of each salesman is governed by an individual salesmen's contract.

In November, 1974, Petitioner informed the salesmen that a new salesmen's contract would become effective as of January 1, 1975. From that time until April 18, 1975, Hill engaged in activity directed to securing a more favorable contract, much of which activity the Petitioner acknowledges was protected. This included the arranging of meetings with employees on several occasions, meeting with management, corresponding with and telephoning employees and submitting written proposals to management. The company rejected all of Hill's suggestions re-

garding the terms of the contract and by the end of March, 1975, all of the salesmen except Hill had signed the new salesmen's agreements. Hill finally signed his agreement on April 16, 1975. On April 18, 1975, Hill unsuccessfully attempted to arrange a conference call with the Executive Vice President of Marketing. Following this, Hill made no more attempts to contact management regarding the contract, but confined his complaints to his immediate supervisor. The other salesmen complained to the supervisor concerning the terms of the new contract to the same extent as Hill.

On October 27, and 28, Hill made two telephone calls to the Chairman of the Board of Petitioner's corporation at corporate headquarters in Allentown, Pennsylvania, for the purpose of inquiring about the purchase of a branch or distributorship. Phone calls from salesmen to corporate headquarters are in violation of written company policy and Hill admitted that he had been previously warned about making such calls. By letter dated October 28, and received by Hill on October 30, Hill was advised that his contract with Petitioner was terminated, effective in ten days, in accordance with the terms of the salesmen's agreement.

The Petitioner asserts that Hill was discharged for poor sales performance. The evidence shows that during the years 1970 through 1974, Hill sold an average of 66 trucks per year. In 1974 he sold 54 new and 16 used trucks. In contrast, during the ten months he worked in 1975, he sold only four new trucks and four used trucks. Although Hill had 18 years sales experience as a salesman, other employees at the O'Hare Branch with only two or three years experience sold 14 to 17 new trucks in that

same ten-month period. It also was shown that Hill made only 148 calls upon customers during 1975 as compared to other salesmen's 640 calls during the same period and that he made no calls upon customers whatsoever during the months of January, February, March, April and July. The evidence also discloses that Hill's poor performance was called to his attention on a weekly basis, from the beginning of the year to the time of his discharge.

The Administrative Law Judge in his decision (Appendix at p. 25), found that the charge was not barred by the statute of limitations and that Hill was discharged because of his protected concerted activity and directed, inter alia, reinstatement with back pay. In arriving at this conclusion he discredited all of the Petitioner's testimony and evidence and credited all that of Hill. He justified Hill's poor sales performance and specifically found Hill's complaints to his supervisor were protected activity. He ascribed as the real reason for Hill's discharge his telephone call to the Chairman of the Board, which he found to be protected activity, even though said call did not concern protected activity, calls to corporate headquarters were in violation of company policy and Hill had been warned against making such calls.

The National Labor Relations Board by order affirmed the rulings, findings, and conclusions of the Administrative Law Judge and adopted his recommended order (Appendix at p. 24). The Third Circuit Court of Appeals did not permit oral argument and dismissed Petitioner's petition for review without any discussion of merits of the case (Appendix at p. 21).

REASONS FOR GRANTING WRIT

1. The Court of Appeals let stand an order of the National Labor Relations Board finding the Petitioner guilty of an unfair labor practice for discriminately discharging an employee which charge is clearly barred by the limitations provision of the National Labor Relations Act and is contrary to a decision of the Supreme Court of the United States.

It is apparent from the record in this case that on October 28, 1975, employer's letter of dismissal was mailed to Hill. It is undisputed that on October 29, 1975, his supervisor, via telephone conversation, told Hill of the contents of the letter and on that same day showed him a carbon copy of the same. On the following day, October 30, 1975, Hill received the original of said letter in the mail. Said letter dated October 28, 1975, in part, reads as follows:

> "You are hereby advised that your employment with Mack Trucks, Inc. is cancelled in accordance with your employment contract effective 10 days from the date of this letter."

Section 10(b) of the National Labor Relations Act provides, inter alia, as follows (29 U.S.C.A. §160(b)):

> ". . . Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . ."

In this case, the employer's conduct, if unlawful, was completed no later than October 30, 1975, when Hill received formal notice of his discharge. Thus, omitting the day the alleged violation occurred, the period commenced to run on October 31, 1975, continued for six months and expired on May 1, 1976. *George D. Auchter Co.,* 102 NLRB 881 (1953). Therefore, Hill's charge filed on May 5, 1976, was too late.

The U.S. Supreme Court in *Local Lodge No. 1424 Machinists vs. NLRB,* 362 U.S. 411, 4 L.Ed. 2d 832, 80 S.Ct. 822 (1960), explicitly bars unfair labor practices predicated upon events which occurred outside the six-month period. In that case, the Supreme Court at page 416 distinguished between two different kinds of situations as follows:

> "The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose Section 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves

to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice."

The situation in the instant case is clearly of the second variety mentioned above for the entire foundation of the unfair labor practice is the time-barred act of discharging Hill. The cessation of employment, which occurred within the six-month period, can be charged to be an unfair labor practice only through reliance on the earlier unfair labor practice which is time barred. This is not permissible under the aforesaid ruling of this Court.

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2. The order of the Third Circuit Court of Appeals let stand a decision of the National Labor Relations Board expanding the definition of "concerted activity" to include activity never before held to be protected.

The National Labor Relations Board is continually and systematically enlarging the scope of protected activity. If the Board is permitted to continue on this course unchecked, there will be no activity of an employee which is not protected, and no company rule which may not be violated with impunity.

In the instant case, the Board specifically found that complaints by a salesman to a superior concerning the terms of his individual contract of employment, and telephone calls to corporate officials at corporate headquarters, contrary to written policy, were protected activities.

The record shows Hill signed his salesman's agreement on April 16, 1975. This agreement spelled out his compensation and the other terms of his employment. His efforts to secure a more favorable contract had failed. Following one last effort on April 18, 1975, to arrange a conference call with the Executive Vice President of Marketing, his only activity concerning the terms of the contract was to complain to his immediate supervisor on a weekly basis. The other salesmen complained about their contracts to the same extent as Hill. The Board found that these complaints constituted protected concerted activity. This finding is contrary to the ruling in *NLRB v. Office Towel Co.*, 201 F.2d 838 (2nd Cir. 1952), which held that "gripes" and "grouses" are not protected activity.

It is submitted that expediency was the sole reason for this finding, to bridge the six-month gap between April 18, the date of his last actual concerted activity, and October 28, 1975, the date of his discharge. This finding is so critical in this case because without it there could be no proximate cause between the concerted activity and the discharge.

More obviously improper is the Board's finding that a telephone call in this case was protected. The Board specifically found that a call by Hill to the Chairman of the Board of Mack Trucks, Inc. was the actual reason for his discharge.

First, it is clear that the company had an established written policy which prohibited phone calls from salesmen to corporate headquarters. This written policy was distributed to salesmen and other branch employees on June 14, 1974, long before any of Hill's alleged protected ac-

tivity. Second, it is equally clear that Hill was aware of that policy in that he testified that he had been told in April, 1975, that his phone calls to Allentown were gross insubordination and that there were to be no more calls to Allentown. The question remaining, then, is whether an employer may establish and enforce such a rule. Incredibly, the Administrative Law Judge stated that such a rule may not be applied to protected activity. Passing for the moment the fact that Hill testified that the calls concerned the purchase of the O'Hare branch, not protected activity, it is inconceivable that the Board could find the calls protected in the face of the company rule prohibiting the same and the previous express warnings against future calls.

Nevertheless, it appears that the issue involved is whether the company rule prohibiting calls by various employees to corporate headquarters violates an employee's right to engage in protected activity. Stating the problem differently, is an employee denied any of his rights guaranteed by the National Labor Relations Act if he is prohibited from calling corporate officials at corporate headquarters. Absent any showing that the purpose of a particular rule is to restrict protected activity or that it inherently has the effect of thwarting such acivity, it is not believed the National Labor Relations Act prohibits employers from making reasonable rules concerning employees contacting corporate officials. In the instant case the company rule was not excessively restrictive and permitted a salesman to freely call his branch manager, his regional manager and his regional vice president. It would appear that an employer need not open its telephone lines to higher corporate officials at corporate headquarters. The rule did not prohibit other forms of communication to officials at corporate headquarters, but only phone calls. It is to be noted that the company rule in this case did not preclude Hill from carrying his cause to higher ranked officials at corporate headquarters. On two occasions he met with the Executive Vice President of Marketing, at corporate headquarters, in Allentown, at employer's expense, and there was an exchange of correspondence between the two on a number of occasions.

In balance, considering the many responsibilities and duties of officials at corporate headquarters, it is believed a rule prohibiting calls to them is reasonable and not in violation of rights guaranteed by the Act. The Court in *NLRB v. Mylan-Sparta Co.*, 166 F.2d 485, 491 (6th Cir. 1948), stated that the Act does not take from the employer the right to make and enforce reasonable rules for the conduct of its business.

Additionally, the employer does not quarrel with the principle that a discharge may be unlawful if the employer mistakenly believes the employee was engaged in protected activity, when, in fact, the activity was not protected. In this case, the discharge, if motivated by the call, was lawful because the telephone call, regardless of the employer's belief concerning the same, was contrary to reasonable company policy and the employee had been warned against future breaches of that policy.

Accordingly, the telephone calls, for whatever purpose, were not protected and the employer had the right to discharge the employee for making the same. The determination of whether the punishment was too severe is not within the province of the National Labor Relations Board.

Cusano v. NLRB, 190 F.2d 898, 902 (3rd Cir. 1951); *NLRB v. Coats and Clark, Inc.*, 231 F.2d 567 (5th Cir. 1956); *NLRB v. Wagner Iron Works*, 220 F.2d 126 (7th Cir. 1955).

Finally, since it is the burden of the General Counsel to prove a discriminatory discharge, if the National Labor Relations Board disbelieves the employer's stated reason for the discharge and finds a different reason therefor, which reason, in fact, is not protected activity, the General Counsel still has failed to meet his burden of proof. The Court in *NLRB v. Minnotte Mfg. Corp.*, 299 F.2d 690, 692 (3rd Cir. 1962), stated "unquestionably, the law imposes the burden of proving an improper cause upon the General Counsel rather than imposing upon the employer the burden of showing the discharge was for a proper reason". Thus, the introduction of evidence to show that the call was not protected is not a "shifting defense" as suggested by the Administrative Law Judge, but a furnishing of facts to insure a proper application of the law.

It is submitted that the Board's expanding pattern of enlarging the scope of concerted activity requires a review by this Court at this time, not only to reconcile the conflicting attitudes among the Circuit Courts, but to determine whether the Board's application of the law is reasonable and fair.

3. The Third Circuit Court of Appeals in this case did not satisfy its responsibility for reviewing the decision of the National Labor Relations Board to determine whether said decision is reasonable and fair and supported by substantial evidence on the record considered as a whole.

The National Labor Relations Act specifically provides that the findings of the National Labor Relations Board are binding upon the Courts only if supported by substantial evidence on the record considered as a whole (29 U.S.C.A. §160(f)). The Supreme Court of the United States in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 95 L.Ed 456, 71 S.Ct. 456 (1950), set forth the responsibility of the Courts in reviewing decisions of the National Labor Relations Board, to insure that they are reasonable and fair. In that decision the Supreme Court stated that in determining whether an order of the Board is supported by substantial evidence the Courts must take into account whatever in the record fairly detracts from the weight of the evidence, and cannot uphold a decision of the Board merely on the basis of evidence which in and of itself justifies it, without taking into account contradictory evidence or evidence from which contradictory inferences could be drawn.

In this case the employer's evidence, regardless of how well it was corroborated or documented, was uniformly rejected, fault was found with all its actions, all of its motives were doubted and every possible unfavorable inference was drawn against it.. It is not believed that a fair reading of the testimony warrants so harsh a treatment.

On the other hand, Hill's testimony in all material respects was accepted at face value, all his faults were excused and all his shortcomings were justified. Certainly, the Board's evaluation of the evidence does not meet the "reasonable and fair" standard as established by the Supreme Court in *Universal Camera Corp. v. NLRB,* supra. Furthermore, the entire case against the Petitioner is founded upon a pyramiding of inferences. It has been held that a finding of fact predicated upon an inference drawn upon another inference is not supported by substantial evidence. As one Court, in *Interlake Iron Corp. v. NLRB,* 131 F.2d 129, 133 (7th Cir. 1942), put it:

> "Such a method could be extended indefinitely until there would be no more substance to it than the soup Lincoln talked about that was 'made by boiling the shadow of a pigeon that starved to death'."

In the case at bar we have just that situation. The fact of discriminatory discharge, an inference itself, was predicated upon the inference that it was motivated by the telephone call to the Chairman of the Board, which inference was drawn from the inference that the employer mistakenly believed the call concerned protected activity. There is not a scintilla of evidence in the record to support either inference relied upon to arrive at the "fact" of discriminatory discharge. Both are contrary to all the uncontradicted factual evidence.

In the instant case, there being no fact evidence to support the inference of discriminatory discharge, it was necessary for the Board to discredit all the employer's witnesses, credit the charging employee's testimony in its entirety, substitute its judgment for that of the employer in

evaluating the employee's work performance, strike down the employer's rule concerning telephone calls to corporate officials and nullify the terms of the individual contract of employment between the employer and its salesman.

It would appear that to justify so absolute a rejection of every aspect of an employer's defense, at least a pattern of questionable practices or hostile conduct should be present, which might logically point to an unlawful interference with the rights of employees. In this case an isolated discharge of one employee stands alone, with no evidence of any other conduct on the part of the employer which might be considered questionable, hostile or in violation of employees' rights. Even the alleged protected activity is marginal at best and certainly not "concerted" within the ordinary meaning of that term.

It is believed that the Board's uniform failure to credit the employer's evidence and its refusal to give it the benefit of any reasonable doubt demonstrates the Board's failure to fairly evaluate the evidence or balance the many conflicts in the testimony. Contrary to the Board's findings in this case, experience has shown and the Courts have recognized that even the worst of employers are not all bad and the purest of employees are not without some fault.

The Court of Appeals accepted all the findings and conclusions of the Board and denied Petitioner's petition for review without hearing argument and without rendering an opinion. It is submitted that the petitioner has been denied a meaningful judicial review in this case and that certiorari should be granted to furnish that review.

CONCLUSION

For the foregoing reasons petitioner respectfully requests that this Court grant the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

WILBUR C. CREVELING, JR.
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 77-1975

Mack Trucks, Inc.
Petitioner

v.

National Labor Relations Board,
Respondent

David E. Hill
Intervenor

Petition for Review from the
National Labor Relations Board
(Board No. 13-CA-15412)

Submitted Under Third Circuit Rule 12 (6)
March 27, 1978

Before:

Aldisert, Gibbons and Higginbotham, *Circuit Judges*

JUDGMENT ORDER

After considering the contentions of the petitioner for review and of the National Labor Relations Board, it is

ADJUDGED AND ORDERED that the petition of Mack Trucks, Inc., to vacate and set aside the order of the National Labor Relations Board be and the same is hereby denied and that the application by the National Labor Relations Board for enforcement of its order be and the same is hereby granted.

Costs taxed against petitioner.

By the Court,
(s) Ruggero J. Aldisert

Attest:
Thomas F. Quinn, *Clerk*

Dated: March 27, 1978

230 NLRB No. 163

JMW
D—2698
Elk Grove Village, Ill.

UNITED STATES OF AMERICA

Before The National Labor Relations Board

Case 13—CA—15412

Mack Trucks, Inc.

and

David E. Hill, an Individual

DECISION AND ORDER

On March 24, 1977, Administrative Law Judge John P. von Rohr issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in answer to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Mack Trucks, Inc., Elk Grove Village, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. July 20, 1977

Howard Jenkins, Jr., *Member*
Betty Southard Murphy, *Member*
Peter D. Walther, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

[1]The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

JD-176-77
Chicago, IL.

UNITED STATES OF AMERICA
Before The National Labor Relations Board
DIVISION OF JUDGES

Case 13-CA-15412

Mack Trucks, Inc.

and

David E. Hill, An Individual

Paula Goodgal and Sheryl Dritt, Esqs., for the General Counsel.

Wilbur C. Creveling, Esq., for the Respondent.

DECISION

Statement of the Case

JOHN P. von ROHR, Administrative Law Judge: Upon a charge filed on May 5, 1976, the General Counsel of the National Labor Relations Board, by the Regional

Director for the 13th Region (Chicago, Illinois), issued a complaint on July 30, 1976, against Mack Trucks, Inc., herein called the Respondent or the Company, alleging that it discharged David E. Hill in violation of Section 8(a) (1) of the National Labor Relations Act, as amended, herein called the Act. The Respondent filed an answer denying the allegations of unlawful conduct alleged in the complaint.

Pursuant to notice, a hearing was held before the undersigned in Chicago, Illinois, on November 22 and 23 and on December 7 and 8, 1976. Briefs were received from the General Counsel and the Respondent on January 24, 1976, and they have been carefully considered.[1]

Upon the entire record in this case, and from my observation of the witnesses, I hereby make the following:

Findings of Fact

I. The Business of the Respondent

The Respondent is a Pennsylvania corporation with its headquarters and principal place of business located in Allentown, Pennsylvania, where it is engaged in the manufacture and sale of trucks. The only facility involved in this proceeding is its branch sales office located in Elk Grove, Illinois, herein referred to as the O'Hare Branch.

During the calendar year preceding the hearing herein, Respondent shipped goods valued in excess of $50,000,

[1]The General Counsel's unopposed motion to correct the transcript, as attached to its brief, is hereby granted.

from its Pennsylvania plant to points and places located outside the State of Pennsylvania. Respondent concedes, and I find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Unfair Labor Practices

A. *The Issues*

At issue in this proceeding is whether Respondent's discharge of David E. Hill, which discharge was announced on October 29, 1975, but was made effective as of November 6, 1975, was premised on his having engaged in protected concerted activities and therefore violative of Section 8(a) (1) of the Act. Respondent also contends that the charge is barred by Section 10(b) of the Act.

B. *The Protected Concerted Activities of David E. Hill*

Respondent, headquartered in Allentown, Pennsylvania, divides the nation into six regions for marketing purposes. The Central Region, which is the one principally involved in this proceeding, consists of seven branches including the O'Hare branch located in Elk Grove Village, Illinois. David Hill, who was employed by Respondent as a truck salesman for 17 years, worked at the O'Hare branch for approximately the last 4 years of his employment. With respect to the supervisory structure involved herein, this at all material times, beginning from bottom to the top, was as follows: *M. E. Meyers* was the O'Hare Branch Manager and Hill's immediate supervisor; next in line was *Bruce R. King*, the district manager of the three Chicago area branches, including O'Hare; *Bernard E. Platt*, also located in Chicago, is Vice President of the Central Region and is in charge of all branches and dis-

tribution in the Central Region;[2] *Garner L. Davis,* to whom Platt answers and who is located in Allentown, Pennsylvania, is Respondent's Vice President of Sales; and at the top, insofar as this proceeding is involved, is *H. Kenneth Tooman,* Executive Vice President in charge of the Marketing Division.

It may be stated at the outset that there is little dispute concerning the nature and extent of Hill's activities which are relevant to the case. Indeed, Respondent concededly does not contest Hill's role in his attempt to secure a more favorable salesmen's agreement or the fact that much of his activity was protected.[3] However, in determining whether Hill was discharged for his poor work performance, as asserted by Respondent, or for reasons proscribed by Section 8 (a) (1) of the Act, as alleged by the General Counsel, it becomes necessary to set forth Hill's activities in some detail.

All Company truck salesmen are under contractual employment with Respondent under individual Sales Representative Agreements which set forth the terms and conditions of their employment, including the basis and structure of their commissions. These contractual agreements are effective for a one year period only. In November, 1974, Branch Manager Meyers announced to the approximate six salesmen employed at the O'Hare branch that a new salesmen's contract would be effective as of January 1, 1975, and at the same time explained to them the commission basis which would be effective under the new contract. Without setting forth the differences under

[2]The Central Region encompasses territories located in 11 states.

[3]Respondent's brief.

the old and proposed new contract, suffice it to note that the economic benefits which would accrue to the salesmen under the 1975 contract were notably less than they received under the 1974 contract.

Hill soon ascertained, by computation, the economic disadvantages of the 1975 contract. Discussing the matter with other salesmen and ascertaining that they also were dissatisfied with the proposed contract, Hill arranged a meeting on November 27, 1974, at Otto's restaurant in Chicago. This meeting was attended by 11 or 12 salesmen of the O'Hare and Chicago branches. After discussing various strategies to be taken in opposition to the new contract, it was agreed that Hill would request Meyers to arrange a meeting with Regional Vice President Bernard Platt and District Manager Bruce King. That same day Hill informed Meyers of his meeting with the other salesmen. In addition to requesting a meeting with the aforenamed company officials, Hill suggested to Meyers that an official from Allentown also be present. Later in the day Meyers advised Hill that a meeting had been arranged for December 7, 1974, at the Chicago branch.

On December 2, 1974, Hill prepared a letter in the form of a petition addressed to Platt requesting that the salesmen remain under the old contract. At about the same time he procured the signatures of 10 other salesmen to this petition, in addition to his own. The December 7 meeting was held as scheduled, with various local management officials present, during which Hill presented the December 2 petition. Platt explained that sales had not been good and that profits were down. He concluded by saying that the contract was going to be nationwide and that he could make no exception for one or two local branches.

Shortly after the above meeting, the O'Hare and Chicago branch salesmen again met at Otto's restaurant. At that meeting it was decided to contact other salesmen from other branches around the country to solicit their help in opposing the contract. Hill, who was selected to take this action, prepared and sent letters to 10 or 15 salesmen in different branches throughout the country asking them to take up the matter with their local management. On about December 15, Hill sent a similar letter, which included a comparison of the current and proposed commissions, to an additional 50 to 70 salesmen throughout the country. This letter was shown to Meyers by Hill. Several days later, according to Hill, Meyers broached him and stated, "David, you better cool it. You may be set up to be fired." When Hill asked why, Meyers replied, "Just cool it."

In the latter part of December, 1974, Meyers announced that a meeting concerning the proposed contract would be held in Allentown, Pennsylvania, in early January, 1975, and that each region would be represented by a salesman. Hill promptly contacted the various branches of the Central Region and arranged to have a meeting at his home to discuss strategy. This meeting was held on December 29 and included some salesmen from out-of-state. The contract was discussed and Hill was selected to represent the Central Region at the Allentown meeting. Hill apprised Meyers of the result. However, a few days later Meyers told Hill that "the rules had changed," that each branch would vote by ballot to select a representative. He added that he (Hill) had "better get on the phone and do some politicking." At a subsequent meeting held in Hill's home on about January 3, 1975, Hill was voted the Central Region representative.

Arriving in Allentown on January 6, 1975, Hill met that evening with four other regional representatives and agreed upon a contract proposal to present to management the next day. Hill drafted a letter containing the proposal and it was signed by those present. The next morning, January 7, Hill and the four other regional representatives met with Tooman, Davis and other management representatives. Hill presented the letter he drafted the night before. Following some discussion, Tooman held up a copy of a letter Hill had sent to other salesmen earlier in December comparing the commission under both contracts and remarked, "What Dave Hill has done here is not 100 percent accurate," adding that the proposed contract was better than that of Respondent's competitors or its own distributors. The meeting concluded with Tooman stating that suggestions could be mailed to him, including any proposed incentive or bonus plans. After the meeting the regional representatives met at their hotel and agreed to keep in touch with each other concerning the drafting of a proposed incentive plan for the new contract. Hill volunteered to coordinate the effort. In fact, after returning from Allentown, Hill apprised Meyers about the meeting and subsequently telephoned other salesmen about possible incentive plans relative to the new contract.

Hill returned to Allentown for a sales seminar held between January 14-17, 1975. Suffice it to note that Hill took this occasion to meet with Tooman (with Ed Gustafson, vice president of sales also present) to again discuss the contract. During the meeting Hill showed Tooman three incentive or bonus plans proposed by the Central Region. He finally told Tooman that he would again speak with the Central Region salesmen, following which he

would submit a finalized incentive proposal for the new contract. At the final banquet after the seminar, Hill talked to T. R. Galvin, vice president of marketing, about the contract. Galvin told Hill that he had authorized the new contract, that he thought it was excellent and that he hoped the salesmen like it. Hill rejoined to the effect that this would be possible if an incentive program would be included.

On January 15, 1975, Tooman sent a letter to Hill, with copies to four company officials, all regional vice presidents, district managers and branch managers, advising that "the . . . contract has been described to you verbally" but that "some salesmen have misconceptions of its details and effect." The letter went on to compare potential earnings under the old and proposed new contract. Upon receipt of the letter, Hill discussed its contents with Meyers.

On January 30 and on February 24, 1975, respectively, Hill sent two letters to Tooman in which he presented the Central Region's formal proposals for an incentive plan for the new contract, all of which he had previously discussed with salesmen of the other branches in the region as well as with the regional sales representatives who had attended the January 7 Allentown meeting. No response was made by Tooman to either of these two letters.

By letter dated March 17, 1975, all regions received a letter from Respondent's Allentown headquarters enclosing a supply of the 1975 contracts, which were to be effective January 1, 1975. The letter requested that the contracts be executed and returned as soon as possible. All the salesmen in the Central Region, except Hill, promptly

signed the contract. Hill finally signed it a day or two later, but not until after considerable discussion and prodding by Meyers.

On April 18, 1975, Hill again wrote Tooman and this time requested that a conference be held with him and the five regional representatives during the week of April 21, 1975 to discuss any decision concerning their previously submitted proposals. In response Hill received a telegraph from Tooman's secretary advising that Tooman would be out of his office until mid-May.

On or about April 25, 1975, Hill telephoned Tooman. When Tooman's secretary answered and advised that Tooman was out, Hill asked the secretary if a bonus plan to be voted upon at the stockholder's annual meeting at the Signal Company, Respondent's parent corporation, to be held on April 29 would be applicable to the truck salesmen. The following day the secretary called Hill and advised that the salesmen would not be affected.

Hill testified that on April 28, 1975, he was told by Meyers that Platt wished to see them at the Chicago office. The two met there with Platt on the same day. Platt began by saying that he understood Hill was making phone calls to Allentown. Hill replied that he had made a call because Tooman had requested that proposed incentive plan suggestions be sent to him, that this had been done, and that he wished to learn of Tooman's decision. At this point Platt went on to say that sales were down, that losses had been incurred, that some of the Company's senior salesmen had been let go, and that the new contract was a good one. Adding that he initially was opposed to the regional sales representatives meeting with management in Allentown, Platt stated that he was apprehensive that "the salesmen

would go out of channels." When Hill responded that the representatives had been told by Tooman to send their proposals directly to him, Platt stated, "Well, we'll have no more phone calls."[4]

C. *Hill's Discharge*

On Monday, October 27, 1975, Hill placed a telephone call to H. J. Nave, Chairman of the Board of the Respondent, who is located in Allentown. The purpose of this call, according to Hill, was to inquire about the possibility of purchasing a distributorship. Nave's secretary advised that Nave was in a meeting but that he would return the call if Hill would leave his name and telephone number. Hill did so.

On the morning of October 29, 1975, Hill received a call from Meyers at home. Meyers first asked if Hill had planned to come to the office that day. Hill replied that he did not.[5] Meyers then stated that he had a letter of termination for him. He also asked, "What have you done?" Hill responded, "Well, I tried to reach Mr. Nave." With this Hill left to meet Meyers at the office.

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[4]Concerning the above meeting and its contents, Platt testified that he thought he heard about Hill's call to Tooman from one of the secretaries. However, he denied questioning Hill about the call in April and said he never spoke to Hill about it. I credit Hill's testimony concerning this discussion, as set forth above. This is not to say that I credit Hill's entire testimony in this case, particularly that relating to his work history. However, from my observation I am satisfied that Hill's testimony concerning his participation in all the contractual activities under discussion, including the various meetings and phone calls relating to the subject, was accurate and truthful.

[5]Except for Monday sales meetings, the truck salesmen did not usually report to the office before making their calls.

There is a dispute in the testimony as to whether Meyers gave Hill any oral explanation for his discharge when Hill arrived at the office. Meyers' version will be related later in this Decision in context with Respondent's defense. I set forth here Hill's version. Meeting in Meyers' office at the O'Hare branch, it is first of all undisputed that at this point Meyers handed Hill a copy of a letter which stated as follows:

> Dear Mr. Hill:
>
> You are hereby advised that your employment with Mack Trucks, Inc., is cancelled in accordance with your employment contract, effective ten (10) days from date of this letter.
>
> Will you please arrange to turn in to the O'Hare Branch all Mack Truck property which is in your possession.
>
> Very truly yours,
> Bruce R. King, District Manager

After handing Hill the letter, Meyers asked Hill why he had called Nave. Hill responded that his purpose was to discuss the possibility of purchasing the O'Hare branch. When Hill thereupon asked the reason for his termination, Meyers replied that he did not know but that he would try to find out. With this the conversation ended.

Hill testified that during the next 5 or 6 days he spoke to Meyers on several occasions, by phone and in person, but that Meyers would not give him a reason for his Discharge. During one of his final talks with Meyers, Hill asked "What excuse are you going to use?" Meyers laughingly replied, according to Hill, "Well, they may try poor performance."

Although handed a copy of the discharge letter on October 29, Hill received the original through the mail on October 30, 1975. That same day Hill wrote King a letter which stated in pertinent part as follows:

> Received your letter dated October 28, 1975, in todays mail. At your earliest convenience, *would you be kind enough to inform me of the specific reason that prompted your letter of October 28th.* (Underlining [italics] supplied.)

Receiving no reply to the above letter, Hill sent two additional letters to King dated November 13 and November 22, 1975, in each of which he again requested to be given "the specific reason" for his termination. It is undisputed that no answer was made to any of these letters.

D. *Additional Facts; Respondent's Defense*

Respondent's answer asserts, as did Respondent's counsel at the outset of the hearing, that Hill was discharged by reason of his poor work performance. However, and apart from the merit of this particular contention, the evidence is abundantly clear that Hill's termination was also linked to the telephone call which he placed to Chairman Nave on October 27. From Respondent's entire defense in this case, as will be hereafter set forth, it appears to be Respondent's further contention that Hill's discharge, at least in part, was also due to the fact that he breached a company rule prohibiting employees from making unauthorized calls to the Allentown executive offices.

I turn first to a discussion of Hill's work performance and of various related circumstances. There can be no

question but that during his approximate 17 years of employment with Respondent prior to the year 1975, Hill was an excellent salesman. Indeed, Meyers testified, "I would rate David Hill's performance as probably *one of the top five in the United States.*"[6] (Underlining [italics] supplied.) While this testimony quite obviously speaks for itself, it is also noteworthy that for 6 years prior to 1975 Hill's performance was recognized by his being admitted to Respondent's Bulldog Club, an honorary organization limited to Respondent's top salesmen.[7]

As will be indicated below, the number of vehicles sold by Hill, as well as the other O'Hare salesmen, dropped sharply in the year 1975. This was due to two factors. One was that due to a proposed anti-skid law which dealt with the altering of breaks, a number of customers stocked up during the year 1974 to avoid possible extra expense which the new law might entail. More importantly, Respondent's business, like many others, was seriously affected by the recession which set in during the year 1975. Without belaboring the matter further, the situation as it applied to Respondent was aptly described by Meyers, who testified, "The economic situation in 1975 and 1976 was disastrous for Mack trucks."[8]

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[6]There are approximately 250 salesmen employed by Respondent throughout the United States.

[7]Hill's latest membership to the Bulldog Club was mentioned by Meyers in a memo to the O'Hare employees dated March 26, 1975. Hill was the only employee of the O'Hare branch to make this achievement.

[8]Meyers added that his was due to the fact that "the majority of our trucks have gone to construction markets and there has not been a construction market in Chicago."

With specific reference to Hill's sales performance during the 10 months he worked in 1975, the record reflects that during this period Hill sold eight new trucks and four used trucks. During the same period Hill placed orders for five additional trucks, but these were not to be delivered to the customers until after his discharge.[9] This compares to Hill's selling 54 new trucks and 16 used trucks during the 12 month period of 1974. Although Hill's record for 1975 undoubtedly looks bad when compared to 1974, aside from the economic circumstances cited above it is noteworthy that other of Respondent's of O'Hare experienced an equally poor performance in 1975. Thus, Salesman Herzog, employed since November 1974 and who voluntarily quit in December, 1975, sold two new trucks and 2½ used trucks in 1975; Salesman Adamson sold 11 new trucks and three used trucks during the year 1975; Salesman Magruson sold eight new trucks and two used trucks in 1975; Saarfo sold nine new trucks and no used trucks in 1975; the son of Platt sold nine new trucks and no used trucks in 1975. On the other hand, Salesman Novelli sold 17 new trucks and Salesman Corokey sold 14 new trucks in 1975. Summing up total sales, the O'Hare branch sold 184 new trucks and 50 used trucks in 1974, compared to 54 new trucks and 19.5 used trucks in 1975.

Among other things, Respondent asserts that Hill's past record as top salesman and as the most experienced employee in the Chicago area is demonstrative of the fact that he could have and should have produced better results in 1975 notwithstanding the above described prevalent

[9]Respondent considers the sales a completed transaction at the time of delivery and receipt of payment, at which time the salesman receives credit for the sales.

economic conditions and the sales records of the other employees. Indeed, Respondent appears to assert, it was Hill's very obsession with the new sales contract that was at least partially the cause for his not producing. On the entire record, I cannot say that this argument does not have some merit. Nevertheless, the question still remains whether Hill's performance for the first 10 months in 1975 was the real and entire basis for the termination of this employee as announced on October 29, 1975. This requires further examination of other relevant evidence.

One important indicia of possible discrimination in the discharge cases which come before the Board is whether the discharged employee, for whatever his alleged deficiency, was given any warning therefor prior to his termination. In this case, Meyers testified that he spoke to Hill on numerous occasions about getting down to work. These talks with Hill, he said, generally occurred just after the weekly sales meetings held each Monday with all the salesmen, at which time he would take Hill aside and talk to him. He described the tenor of these talks as follows:

> Dave and I would sit down. He would ask for any information that I had received on the contract, and the basis of the thing is that "Dave, we've got to go to work, we are not selling anything doing it this way . . . I asked him to go out and try to get himself in a new frame of mind, let's go out and just call on ten customers today and pick them at random, we might find someone interested in buying a truck."

Hill denied that anyone spoke to him individually about his work performance and testified that he did not recall Meyers ever talking to him individually after the sales meeting. I do not credit Hill's testimony to this effect,

but I credit Meyers' testimony that on occasion he did speak to Hill in the manner indicated above. Nevertheless, I do not deem this form of mild admonishment to constitute anything in the nature of a serious warning, i.e., the type of warning that one would reasonably expect to be given a senior and top ranked employee prior to resorting to the extreme penalty of discharge.[10]

Also cited in Respondent's brief is a warning to Hill alleged to have occurred during a luncheon meeting which District Manager King had with Hill in January or February, 1975. King testified that the prime reason for meeting with Hill at this time was because Hill, who at the time had returned from the Allentown meeting, wished to get his (King's) views on a proposed draft of an alternate contract. In any event, when asked on direct examination if he brought up Hill's work performance at this time, King responded only that "the performance had seemed to have gone down, it had showed up the previous year, too, toward the end." This testimony clearly does not support a finding that Hill was given a warning at this time.

I have previously related a meeting, concerning which Hill credibly testified, held on April 28, 1975, wherein, *inter alia,* Platt warned Hill about making calls to Allentown. In this connection, it should be mentioned that Meyers and Platt testified concerning a meeting they had with Hill which they vaguely described as having occurred sometime in May, June or July, 1975. Platt testified that prior to this meeting he had learned from one of the Allen-

[10]Hill testified that he was never threatened with discharge. This is not so, for in March, 1972, he was so warned for having removed certain records from the office. However, this obviously did not relate to his work performance.

town secretaries that Hill was trying to reach Chairman Nave by telephone in Allentown. In any event, according to Platt, during this meeting he asked Hill why he was calling the home office. Hill replied, he said, that he was trying to buy a branch or a distributorship. He thereupon told Hill, "Dave, you are a lot better salesman than your records show and why don't you forget all this fooling around and making these phone calls and go out and sell trucks. This is gross insubordination to bypass your branch manager, your district manager, myself and try to contact people at the home office." I do not credit the testimony of Platt and Meyers that any such meeting was held with Hill in May, June or July. Without detailing all the specifics, I have carefully studied this testimony and find it to be substantially vague, confused, inconsistent and contradictory. Hill credibly testified that the only time he called Nave was on October 27, 1975. I find that the only meeting between Platt, Meyers and Hill was the one held on April 28, 1975, when Platt in fact did warn Hill about calling Allentown, this having been prompted by Hill's attempting to reach Tooman in Allentown relative to the contract several days earlier.

I turn now to the testimony of Respondent witnesses concerning the immediate events leading to Hill's discharge. Recalling that Hill left his name with Nave's secretary when he unsuccessfully tried to reach Nave on October 27, 1975, Tooman testified that on the same morning Nave called him, related that Hill had tried to reach him, and asked if he (Tooman) knew what Hill was calling about. When Tooman replied that he did not know, Nave asked that he check into it. Tooman said he would. Tooman, who at the time he spoke to Nave was in a meet-

ing, promptly told Davis to look into the matter. Davis' testimony is at odds with Tooman on this point, for Davis testified that he saw a memorandum that Hill had called Nave and this prompted him to call Platt. In any event, that same morning Davis called Platt while in Tooman's office. Davis asked Platt why Hill had found it necessary to call Nave. The testimony of Davis and Platt concerning the remainder of this conversation is somewhat confused. Platt, who did not give his entire version of this conversation, testified only that at some point while talking with Davis, he decided to ask for permission to terminate Hill. Davis, on the other hand, testified that he told Platt, "I don't know why we continue with this man. His performance is not good. It's not acceptable. *We have this situation here.* (Underlining [italics] supplied.) I don't know why we continue with this man." According to Davis, Platt thereupon stated, "Well, I don't have authority to do anything about it." In any event, at about this point Davis had Platt hold the phone while he went to the personnel department. Davis said that upon returning from the personnel department he told Platt, "You have the authority to do as you wish." Platt, in this regard, testified that, "I got the permission to terminate Mr. Hill."

On the same morning following Platt's discussion with Davis, Platt called District Manager King to his office and informed him of the decision to discharge Hill. The next day, October 28, King went to the O'Hare branch to arrange for the termination, but at this time ascertained that Branch Manager Meyers was in New Orleans. Hill thereupon drafted a letter of termination and left it with a secretary. Meyers was brought up to date about the entire matter after his return from New Orleans, which apparently was on the evening of October 28. How Meyers apprised Hill of his termination is not in dispute and has been previously related. It will be recalled, however, that there is a dispute as to whether Meyers gave Hill a reason for his discharge when Hill came to the office on October 29. Hill testified that Meyers never gave him a reason, either on October 29 or at any time thereafter. In resolving this dispute, Meyers' testimony on direct examination concerning his conversation with Hill on October 29 significantly was as follows:

> A. He came right in my office and wanted to know the details, what had happened. I was somewhat handicapped in that I hadn't been there when this letter had been typed because Dave wanted to know the details and what his future would be with Mack Trucks or if there was a future, what his, you know. I think he had time to think about it on the way in. He was concerned about insurance, where his family would stand in health insurance, so forth.
>
> JUDGE VON ROHR: Incidently, when he came in that day did you at that point read the letter to him or did you show it to him, the copy that you had?
>
> THE WITNESS: I didn't read the letter. I gave him the copy that I had.
>
> Q. (By Mr. Creveling) *What else was discussed? Did he ask why he had been terminated?*
>
> A. *No.* It developed into a, somewhat an emotional encounter. Here's an employee 17 or 18 years with the company and *I am sure Dave knew why he was terminated.* (Underlining [italics] supplied.)

Later in his testimony, however, Meyers gave contradictory testimony concerning the same conversation as follows:

> A. Dave came into my office. The letter of termination was presented. I expressed an opinion that this might be a good, very great opportunity for Dave or it might be a knock. I said the reasoning for or the motive for the termination is poor performance. I might have said poor sales performance period.
>
> Q. What did he say?
>
> A. I really don't remember. I don't remember whether we had a general conversation or not. I don't remember.
>
> Q. You don't remember anything else that was said in this conversation specifically?
>
> A. No, ma'am.

At still other points in his testimony, Meyers uncertainly testified that he spoke to Hill on several other occasions later in the week, that it was during this period that Hill kept asking the reason for his termination, and that during this period he told Hill several times that his termination was due to poor performance. Upon the entire record, and from my observation of the witnesses on the point, I credit Hill's testimony that neither Meyers nor any other Company official ever gave him a reason for his discharge. Aside from finding that Meyers did not give Hill a reason for his discharge, it will be recalled that King did not answer any of Hill's three letters wherein he persistently asked the reason for his discharge. King sought to explain his failure to answer these letters by testifying that he was advised by Meyers that he (Meyers) had told Hill why the action had been taken, and also that he "didn't

think it proper for me to respond" because this was outside the normal chain of command. I find it hard to accept this explanation. It was, after all, King who signed the letter of termination . . . and that letter did not give any reason for the action. Absent a motive to conceal the true reason for the discharge, I think it unreasonable to assume that King would not have extended the courtesy or have taken the time to reply to the request of a 17 year employee to be given the reason for his precipitate termination.

E. *Conclusions*

From the foregoing recitation of facts, it is clearly without question that the immediate cause for Hill's discharge was associated with and prompted by the telephone call Hill placed to Chairman Nave on October 28, 1975. This, then, leads to the crucial question, namely, can it be inferred that Respondent suspected Hill's action in this regard to be in furtherance of his protected activities and that it took the occasion to terminate him for this reason? Upon the entire record in this, I find this question must be answered in the affirmative.

That Hill from the beginning was the leader in the salesmen's efforts to procure a better 1975 contract than that offered by the Respondent has been shown in an earlier section of this Decision and need not be recapitulated here. It has also been shown, through Hill's meetings, telephone calls, written communications and proposals, all of which involved his contacting various levels of Respondent supervisors and higher Company officials, that Respondent became well aware that it was Hill who spearheaded the activity on behalf of the salesmen. Although it appears that Respondent initially reacted with some pa-

tience to the salesmen's complaints over the new contract, from the entire record there can be no doubt that Respondent never intended to waiver from its insistence that the 1975 contract, as initially proposed, be signed by all the salesmen. Thus, notwithstanding the meeting with the salesmen's representatives in Allentown on January 6, 1975, as well as the subsequent proposals sent in by Hill at Tooman's suggestion, no changes were ever made to Respondent's 1975 contract. Indeed, Tooman never responded to Hill's letters of January 30 and February 24, 1975 wherein Hill presented the Central Region's proposed modification of the contract. Instead, on March 17, 1975, the regions were provided with copies of the 1975 contract with an accompanying letter that they be executed and returned as soon as possible. It will also be recalled that when Hill again wrote to Tooman by letter dated April 18 in a further attempt to arrange a meeting to discuss his proposals, Hill merely was advised by telegraph that Tooman would be out of his office until mid-May. Finally, there was Hill's telephone call to Tooman on April 25, 1975, in which he apprised Tooman's secretary, in Tooman's absence, of his concern about a bonus plan, and its possible effect upon the salesmen, to be voted upon by Respondent's parent company. Significantly, called to a meeting with Platt a few days later (April 28) Platt at this time expressed his displeasure to Hill for having called Tooman by telling him, *inter alia,* that "we'll have no more phone calls."

In sum, and upon the entire record in this case, I am persuaded and find that the swift reaction taken by Respondent officials in discharging Hill upon learning of Hill's call to Nave on October 28, 1975, was due to Respondent's belief that Hill again intended to pursue his activities relative to the salesmen contract and/or an incentive plan. Respondent argues that this should not be considered the case in view of the time lapse between Hill's call to Tooman on April 29, 1975, which it asserts was the last event of protected activity, and his discharge on October 28. In finding no merit to the contention, it is noteworthy that Hill credibly testified, as Meyers as much as conceded, that he continued to ask Meyers about an incentive plan two or three times a week up to his discharge. In any event, it is also significant that at the time of Hill's call to Nave the time for renewal of the contract was approaching. As the General Counsel aptly states in her brief, "It is inherently probable that Respondent assumed that Hill considered the time for an expanded protest to be ripe and that Hill was again taking serious action to further the protest and demand a response about incentive plans from top management." But whatever the case, in view of Respondent's precipitious discharge of Hill upon Hill's calling Nave, and in the absence of any other reasonable explanation for taking the action at this time, it is found that the real basis for this action was inherently related to Hill's protected activities.[11]

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[11]Near the close of the hearing, on surrebuttal, Respondent introduced into evidence a memo from a Central Region business manager dated June 14, 1974, which instructed, *inter alia*, that the salesmen were not permitted to phone the Allentown Executive Offices. In view of the late proffer of this evidence, I am impelled to conclude that it came in as an afterthought. Indeed, up to this point Respondent's entire defense was predicated upon Hill's work performance. If Respondent at this point indeed intended to shift its defense, this in itself would be an indicia of discriminatory intent. *Tyler Pipe and Foundry Co.*, 132 NLRB 487; *Buss Machine*

Further buttressing the above finding that Hill was unlawfully discharged is, of course, the fact that he was never given a reason for his termination even though he pressed for one. It has long been established that a failure to give a reason is a strong indicia of discriminatory intent. *N.L.R.B. v. Gregg's Equipment, Inc.*, 307 F.2d 275 (C.A. 5). Moreover, the fact that Hill's immediate supervisor was not consulted before the discharge is likewise an indicia of unlawful motivation.

There remains one further point. Thus, although I find that the reason given for Hill's discharge, namely poor work performance, to be a pretext, assuming *arguendo* that this was a factor entering in Respondent's determination to terminate this employee, it is abundantly clear that Hill's call to Nave was also a substantial reason for taking this action. Again, it is well established that even if a partial reason for a discharge is one proscribed by the Act, a violation thereof must be found. *N.L.R.B. v. Tom Woods Pontiac, Inc.*, 447 F.2d 383 (C.A. 7); *Dilene Answering Service*, 222 NLRB No. 76.

In sum, and for all the reasons stated above, it is concluded and found that Respondent's discharge of Hill was in violation of Section 8 (a) (1) of the Act.

F. *The Section 10 (b) Issue*

It will be recalled that Hill was orally notified of his discharge by his supervisor on October 29, 1975. On the following day, October 30, Hill received a letter also ap-

Work, Inc., 170 NLRB 928. Moreover, and without getting into the question at length, I would not think the rule prohibiting calls to Allentown could be applied so as to protected activity.

prising him of his discharge, but stating that under the terms of his contract the discharge was not to be effective until 10 days from the date of the letter, which would be November 6, 1975. It is undisputed that Hill was carried on Respondent's payroll and paid up through the latter date.[12] The charge herein was filed on May 5, 1976, and personally served on Respondent the same day.

The Respondent contends that the Employer's conduct, if found to be unlawful, occurred no later than October 30, 1975, when Hill received formal notice of his discharge. If this be so, the charge herein obviously would be untimely filed. The General Counsel, on the other hand, urges that the unfair labor practice did not occur until the termination was consummated on November 6, which would place the charge as falling one day within the 10 (b) period.[13]

Under all the circumstances, I am of the opinion that the situation in this case must be viewed as having involved two independent violations of Section 8 (a) (1) of the Act. The first occurred when Hill was initially given notice of his unlawful termination. Undoubtedly the Board would have entertained an unfair labor practice charge at this time, i.e., even before the discharge was implemented. On the other hand, I think it clear that a second and independent unfair labor practice occurred on the date the discharge in fact was implemented. The reasoning here, as I

[12]General Counsel Exhibits 21 and 24.

[13]Section 10(b) of the Act provides in pertinent part ". . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . ."

see it, relates to the fact that it was still within Respondent's province to revoke its action and to return Hill's employment to its *status quo* at any point during the period between the notice and the effective date of discharge. In any event, I believe the 10(b) issue in this case to be largely governed by a Board decision in an analogous situation, *The Great Atlantic and Pacific Tea Company,* 145 NLRB 362. In that case the Board adopted the then Trial Examiner's Decision, which in pertinent part set forth the facts and held as follows:[14]

> Turning to the date of the alleged unfair labor practices and the tolling of the 10(b) period, I find that as to the Charging Parties herein the earliest date of such practices was April 7. While the record shows that Respondents notified representatives of the Meat Cutters late on the night of April 6th, that Respondents would close their stores, the employees, whether members of the Meat Cutters, the Bakery Workers, or the Teamsters, were not locked out until April 7. I do not consider that the notice given to the Meat Cutters just before midnight on April 6th that lockout action would be taken as notice, constructive or otherwise, to the employees, *nor, if I did, would I find a violation of Section 8(a)(3) until the notice was implemented by action. It was on April 7th that the employees found themselves shut off from their employment and that is the date of the unfair labor practices.* (Underlining [italics] supplied.)

[14]It should be noted, however, that apparently no exceptions were taken to the Trial Examiner's findings and conclusions set forth above. The General Counsel has not cited this case and treats the issue as a novel one.

In sum, and for the reasons stated, I find that the complaint herein is not barred by Section 10(b) of the Act. Cf. *N.L.R.B. v. Plumbers & Pipe Fitters Local Union 214,* 298 F.2d 427 (C.A. 7).

IV. The Effect of the Unfair Labor Practice Upon Commerce

The activities of the Respondent set forth in section II, above, appearing in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices violative of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discharged David E. Hill in violation of Section 8(a)(1) of the Act, I shall recommend that Respondent be ordered to offer him full and immediate reinstatement to his former position, or if this position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and to make him whole for any loss of earnings he may have suffered from the date of his discharge to the date of Respondent's offer of reinstatement. Backpay shall be computed in accordance with the formula prescribed in *F. W. Woolworth Company,* 90 NLRB 289

with interest thereon computed in a manner and amount prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

In view of the nature of the unfair labor practices herein found, it will be recommended that Respondent be ordered to cease and desist from in any manner infringing upon the rights guaranteed employees in Section 7 of the Act.

Conclusions of Law

1. Respondent, Mack Trucks, Inc., is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

2. By discharging David E. Hill because he engaged in concerted activity for mutual aid or protection guaranteed to employees by the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

On the basis of the above findings of fact, conclusions of law, and the entire record, and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended:[15]

[15]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Mack Trucks, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee in regard to hire or tenure of employment or any term or condition of employment for engaging in any activity protected by Section 7 of the National Labor Relations Act, as amended.

(b) In any other manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer David E. Hill immediate and full reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, and make him whole for any loss of pay he may have suffered by reason of the discrimination practiced against him in the manner set forth in section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to

the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility located at 2000 Ernhurst Road, Elk Grove Village, Illinois (the O'Hare Branch), copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms to be provided by the Regional Director for Region 13, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 13, in writing within 20 days from the date of this Decision what steps Respondent has taken to comply herewith.

Dated, Washington, D.C., March 24, 1977

(s) John P. von Rohr
John P. von Rohr
Administrative Law Judge

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[16]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

(SEAL) (SEAL)

NOTICE TO EMPLOYEES

Posted by Order of The National Labor Relations Board
An Agency of The United States Government

WE WILL NOT discharge employees because they engage in activities that are protected by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer David E. Hill immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him.

WE WILL NOT in any other manner, interfere with our employees' exercise of rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

MACK TRUCK, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, de-

faced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, Room 881, 219 Dearborn Street, Chicago, Illinois 60604 (Telephone: 312-353-7597).

No. 77-1630

In the Supreme Court of the United States

OCTOBER TERM, 1978

MACK TRUCKS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 21-22) is noted in a table at 573 F. 2d 1302. The decision and order of the National Labor Relations Board (Pet. App. 23-56) are reported at 230 NLRB No. 163.

JURISDICTION

The judgment order of the court of appeals (Pet. App. 21-22) was entered on March 27, 1978. The

petition for a writ of certiorari was filed on May 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that employee Hill's unfair labor practice charge was filed within the six-month limitations period imposed by Section 10(b) of the National Labor Relations Act.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discharging employee Hill because of his protected concerted activities.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

> Sec. 8(a). It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> Sec. 10. * * *
>
> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, * * *: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *.

STATEMENT

A. The Board's Findings of Fact

David E. Hill was a salesman for Mack Trucks, Inc. ("the Company") for 17 years, the last four at the O'Hare Branch near Chicago, Illinois (Pet. App. 27). His immediate supervisor, Branch Manager M. E. Myers, rated him "as probably one of the top five [Company salesmen] in the United States," and from 1969 through 1974, Hill was selected for membership in the Company's Bulldog Club, an organization of top salesmen (Pet. App. 37; A. 278a, 221a-222a).[1]

The employment conditions for the Company's truck salesmen were established by individually-signed, standard one-year agreements (Pet. App. 28). In November 1974, the Company announced that in 1975 a new sales representative agreement would take effect. Under the new agreement, the salesmen were to receive fewer economic benefits than under the existing contract (Pet. App. 29).

Hill led the salesmen's protest against the Company's new sales representative agreement—first on

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[1] "A." references are to the appendix in the court of appeals. A copy has been lodged with this Court.

behalf of the Chicago area salesmen, then as representative of the Central Region,[2] and finally as national coordinator of the salesmen's effort to add incentive provisions (Pet. App. 29-32). In the process, he wrote or spoke to more than fifty other salesmen throughout the country, and he presented the salesmen's views to Kenneth Tooman, the executive vice-president for marketing (Pet. App. 30-32, 45).

During this activity, Branch Manager Meyers warned Hill: "David, you better cool it * * *. You may be being set up to be fired." When Hill asked why, Meyers replied, "Just cool it." (Pet. App. 30; A. 128a.)

The salesmen were unsuccessful in obtaining the desired sales incentive plan in the new agreement. In March 1975, the Company submitted the new contract, which was retroactive to January 1, to the salesmen for signature (Pet. App. 32). In April, Hill became the last salesman in his region to sign the new contract (Pet. App. 33).

Thereafter, Hill continued his efforts to secure an incentive plan for the salesmen. On April 18, Hill wrote Executive Vice-President Tooman, asking what had been decided with respect to the various incentive plans submitted by the salesmen's regional representatives and requesting that Tooman arrange a conference among the regional representatives to discuss their proposals. (Pet. App. 33; A. 78a, 79a.) During

[2] Each region selected a representative to deal with the Company on the proposed contract (Pet. App. 30).

the next week, Hill and other salesmen, including several regional representatives, talked about going to the annual meeting of Signal Corporation, the Company's parent, on April 29, since its shareholders were scheduled to vote on an incentive or bonus plan. On April 25, Hill telephoned Tooman's office to ascertain whether the vote would have any impact on Mack truck salesmen; he was informed it would not (Pet. App. 33; A. 162a-164a).

Hill was reprimanded by Regional Vice-President Bernard Platt for calling the Company's headquarters. Despite Hill's explanation that Tooman had asked the regional representatives to send their proposals directly to him, Platt admonished, "Well, we'll have no more phone calls." (Pet. App. 33-34; A. 164a-165a.) Hill continued his efforts to secure an incentive plan through September, 1975 (Pet. App. 46-47; A. 214a-217a).

On October 27, 1975, Hill placed a telephone call to H.J. Nave, chairman of the board and president of the Company. Nave was unavailable so Hill left his name and phone number and said he was with the O'Hare Branch. He did not explain why he was calling Nave. (Pet. App. 34; A. 169a.)

When Nave received Hill's message, he asked Tooman to find out what Hill wanted (A. 411a, 246a-247a, 250a). Tooman called Vice-President Davis who telephoned Regional Vice-President Platt (A. 411a, 246a-247a, 250a-251a, 98a-99a). Platt did not know why Hill had telephoned Nave (A. 411a, 260a, 99a).

However, during the conversation, Davis told Platt, "I don't know why we continue with this man. His performance is not good. It's not acceptable. We have this situation here. I don't know why we continue with this man." Davis assured Platt that Platt had the authority to fire Hill. (Pet. App. 41-42; A. 411a, 260a, 98a-99a.)

Following his conversation with Davis, Platt instructed District Manager King to fire Hill. On October 28, King wrote Hill a letter, which Hill received on October 30, stating that Hill's employment "is cancelled * * * effective ten (10) days from date of this letter" (Pet. App. 35; A. 80a, 172a-173a, 302a-303a).

Thereafter, Hill attempted to learn the reason for his discharge by writing to district manager King, who did not reply to his inquiries (Pet. App. 36; A. 81a, 329a). Hill also questioned Meyers as to the reason for his termination. In response to Hill's inquiry, "[W]hat excuse are you going to use?"; Meyers responded, "Well, they may try poor performance." (Pet. App. 35; A. 180a-181a.) Hill continued working at his job, contacting customers and drawing a salary, until November 6 (Pet. App. 49; A. 415, 82a, 84a, 103a, 182a).

B. The Board's Decision

The Administrative Law Judge, whose decision was adopted by the Board (Pet. App. 23-24), found that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by discharging Hill because it believed that his call to Nave was part of his effort to obtain different terms in the salesmen's contract,

which was concerted activity protected by Section 7, 29 U.S.C. 157 (Pet. App. 46-48, 52). The Law Judge rejected the Company's assertion that Hill was discharged for poor work performance (Pet. App. 36). The Law Judge noted that Hill had consistently been one of the Company's top salesmen, and that economic factors in 1975 affected not only Hill's performance that year, but the performance of the O'Hare branch as a whole (Pet. App. 37-39). The Law Judge also noted that Hill was given no serious warning that his performance was jeopardizing his job (Pet. App. 39-41).

The Law Judge rejected the Company's argument that the complaint was barred by the six-month limitation of Section 10(b) of the Act, 29 U.S.C. 160(b) (Pet. App. 48-51). The charge was filed on May 5, 1976, more than six months after Hill received the notice of discharge, but within six months of his actual termination on November 6. The Law Judge concluded that there were two independent violations of Section 8(a)(1); the "first occurred when Hill was initially given notice of his unlawful termination," and the second "occurred on the date [of his] discharge," for "it was still within Respondent's province to revoke its action and to return Hill's employment to its *status quo* at any point during the period between the notice and the effective date of discharge." (Pet. App. 49-50.)

The Board ordered, *inter alia*, that Hill be reinstated to his former position (Pet. App. 53, 24). The court of appeals enforced the Board's order by judgment order, without oral argument (Pet. App. 21-22).

ARGUMENT

1. Petitioner contends that any unfair labor practice occurred when Hill received written notification of his impending discharge on October 30, and that therefore his charge, filed on May 5, 1976, was time-barred by Section 10(b) of the Act. The Board found, however, that Hill's actual discharge on November 6 constituted an independent unfair labor practice and that the May 5 charge regarding that discharge was therefore timely.

Contrary to petitioner's contention (Pet. 10-12), the Board's position is fully consistent with *Local Lodge No. 1424* v. *National Labor Relations Board*, 362 U.S. 411. There, the only act within the Section 10(b) period was the enforcement of a union security agreement, valid on its face. This activity, by itself, was benign and could be impeached only by resorting to an event outside the limitations period (*i.e.*, showing that the union lacked majority status when it entered into the agreement). The Court therefore held that the complaint was barred by Section 10(b). Here, in contrast, Hill's discharge was unlawful without reference to the illegality of the prior notification. In such circumstances, the courts have uniformly held that Section 10(b) is no bar to consideration of independent violations occurring within the limitations period.[3]

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[3] See, *e.g.*, *National Labor Relations Board* v. *Plumbers & Pipefitters Local 214*, 298 F. 2d 427, 428 (C.A. 7); *General Motors Acceptance Corp.* v. *National Labor Relations Board*,

2. Petitioner's second contention (Pet. 12-13) that, in any event, Hill was not engaged in concerted activity at the time of his discharge merely takes issue with the Board's contrary evidentiary findings. Thus, while petitioner concedes that Hill was engaged in concerted activity prior to April when he signed the new contract, it claims that his activity thereafter amounted only to individual "gripes" and "grouses" (Pet. 13). The Board's contrary finding is amply supported by the record (Pet. App. 33-34, 47), and raises no issue warranting review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

Petitioner also contends that the Board improperly precluded it from discharging Hill for making an unauthorized call to Company headquarters—an action which the Company asserts was unprotected activity (Pet. 13-16). However, the Board did not find that the Company discharged Hill for making an unauthorized phone call. Indeed, the Law Judge expressly found that the Company's assertion in that regard was an "afterthought," noting that the Company's defense was based on its argument that Hill was discharged for poor performance (Pet. App. 47 n. 11). Rather, the Board found that the Company

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476 F. 2d 850, 853-854 (C.A. 1); *New York District Council No. 9, International Brotherhood of Painters* v. *National Labor Relations Board*, 453 F. 2d 783, 786 (C.A. 2), certiorari denied, 405 U.S. 988, 408 U.S. 930; and see *California School of Professional Psychology*, 227 NLRB 1657, 1665-1666, application for enforcement pending, C.A. 9, No. 77-2162.

terminated Hill because it considered the phone call evidence of Hill's continuing activity to obtain a contract modification. This case, therefore, does not concern the propriety of a discharge for disobeying established Company policy.

Petitioner also objects to the Law Judge's credibility resolutions (Pet. 17-18), and contends that the Board's conclusions were improperly based on inferences (Pet. 18-19). These contentions raise no issue warranting review by this Court. In any event, the Law Judge did not, as petitioner contends, uniformly credit Hill (see Pet. App. 34 n. 4, 39-40, 40 n. 10), and his credibility resolutions were carefully explained (see Pet. App. 41-45). It plainly cannot be said, on this record, that the General Counsel's evidence " 'carries its own death wound' " and that the Company's evidence " 'carries its own irrefutable truth.' " "There is therefore no basis for overturning the Law Judge's credibility resolutions." *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 337 U.S. 656, 659-660. Moreover, it is well settled that "the trier of fact may infer motive from the total circumstances proved." *Shattuck Denn Mining Corp.* v. *National Labor Relations Board*, 362 F.2d 466, 470 (C.A. 9).

Petitioner's contention that the court of appeals improperly enforced the Board's order without oral argument or full written opinion pursuant to Third Circuit Rule 12(b) is insubstantial. See *Taylor* v. *McKeithen*, 407 U.S. 191, 194-195 n. 4; *United States* v. *Baynes*, 548 F.2d 481 (C.A. 3); *National*

Labor Relations Board v. *Amalgamated Clothing Workers of America, AFL-CIO, Local 990*, 430 F.2d 966 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1978.

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